UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANTHONY BELFIORE, on behalf of himself and all others situated, : 14-CV-4090(PKC)

Plaintiffs, :

-against- : United States Courthouse Brooklyn, New York

THE PROCTER & GAMBLE COMPANY, :

Defendant. : July 23, 2020 11:00 o'clock a.m.

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TRANSCRIPT OF MOTION HEARING VIA TELECONFERENCE
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: WOLF POPPER LLP
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

(All present by telephone conference.)

THE CLERK: Civil cause for motion hearing, docket 14-CV-4090, Belfiore versus The Procter & Gamble Company. Before asking the parties to state their appearances, I would like to note the following.

Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings or any other sanctions deemed necessary by the Court.

Would the parties please state their appearances for the record starting with plaintiff.

MR. INSLEY-PRUITT: Good morning. This is Matthew Insley-Pruitt from Wolf Popper LLP on behalf of plaintiff Anthony Belfiore. I'm joined here today by my partner Chet Waldman and associate Philip Black also of my firm.

THE COURT: Good morning, Mr. Pruitt, Mr. Waldman and Mr. Black.

MR. WALDMAN: Good morning, Your Honor.

THE COURT: For the defense?

MR. WEINBERGER: Yes, Your Honor. Thank you. Harold Weinberger from the firm of Kramer Levin Naftalis & Frankel for the defendant The Procter & Gamble Company.

THE COURT: Good morning to you as well.

MR. WEINBERGER: Thank you, Your Honor.

THE COURT: So as everyone is aware, we are here for a final approval hearing of the settlement that has been reached in this matter. The way we are going to proceed is it is going to be fairly streamlined in light of the written submissions that I have seen so far and what appears to be a settlement without any objectors although I will confirm that in a moment.

I have just one general question I wanted to ask about the terms of the settlement and then I will allow the parties to provide any update or supplementation of their written submissions that may be relevant to the approval of the settlement and then we will talk about the mechanics of payment in light of the fact that there are claims forms still forthcoming. Then I will give some instruction about the completion of the or recent submission and completion of the proposed final order.

So is there anything that either side wants to say before I just ask one general question?

Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: No, Your Honor.

THE COURT: Okay. Can everyone hear me?

Mr. Pruitt.

MR. PRUITT: Yes, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: Yes. Yes.

THE COURT: And the court reporter, can you hear me?

THE COURT REPORTER: Yes, Your Honor. Thank you.

THE COURT: So my one question I have, obviously the parties have done a very good job of explaining all aspects of the settlement, is can you explain, and I guess we'll start with Mr. Pruitt, the difference in how or, rather, the amount of damages that are being awarded to consumers or purchasers who either have a proof of purchase and don't have a proof of purchase. Obviously, someone who has a proof of purchase is getting more than someone who does not. What's the rationale behind that?

MR. INSLEY-PRUITT: Well, Your Honor, this is Matthew.

THE COURT: Mr. Pruitt?

MR. INSLEY-PRUITT: Yes.

The rationale is simply that a person who has a proof of claim has the stronger case and were this to proceed to trial, it would have a better case for recovery and there are all sorts of related issues with respect to applicability and other arguments as to why one with a proof of claim has a stronger claim than one who does not. So we thought that a

settlement that reflected that difference would more appropriately reflect the different situation of the class members.

THE COURT: Okay. So the ability to recover is different or the potential ability to recover is different as between those two groups?

MR. INSLEY-PRUITT: Yes, Your Honor.

THE COURT: Okay. Can I ask you a question? This is more by way of curiosity.

Is there any notion too that it protects against fraudulent claims in some way or someone who's, I guess, inclined to just fraudulently claim they bought it is disincentivized by the fact that the recovery is lower?

MR. INSLEY-PRUITT: Well, that's always a part of the back and forth between the parties when negotiating a settlement with respect to the risk of a fraudulent submission and how to strike the balance between incentivizing people to actually file a claim in the first place and disincentivizing someone to file a fraudulent claim.

The other issue you have is as you get more requirements with respect to the claim forms, it's more burdensome, it takes longer and it disincentivizes people. So one of the things that people discuss is the certification or the requirements that are submitted in the claim form. We think that this strikes a balance of incentivizing someone to

submit a claim and not submit a false claim. And, furthermore, the claim administrator has a process of by which they review all the claims and there is a cap on a per household basis. So if somebody goes in there and says I bought a billion packages --

THE COURT: Right.

MR. INSLEY-PRUITT: -- that will not happen. They're going to put a household cap on per claim --

THE COURT: Right, of course.

MR. INSLEY-PRUITT: -- to disincentivize fraudulent submissions.

THE COURT: Can I ask you a question, Mr. Pruitt. If you're on a speakerphone or using a headset, could you actually just use the handheld receiver?

MR. INSLEY-PRUITT: Is that better?

THE COURT: Yes, much. Thank you. And the same for everyone.

MR. INSLEY-PRUITT: Is that better?

THE COURT: Yes. As we use this phone system more and more, it's become clear to me that, to repeat the phrase, you're clearer if you actually use a handset instead of either speakers or most headsets.

Okay. Thank you for that explanation, Mr. Pruitt.

Did you want to add anything, Mr. Weinberger?

MR. WEINBERGER: No, I think Mr. Pruitt has done an

admirable job explaining the rationale.

THE COURT: Okay. Now, generally, is there anything to update or supplement? I imagine maybe there's some more claim forms that have been submitted.

So, first, Mr. Pruitt, is there anything that the plaintiffs want to report beyond what is contained in the written submission?

MR. INSLEY-PRUITT: Yes, Your Honor. This is, again, Matthew Insley-Pruitt.

So we got an update from the claim administrator. That is, I believe, as of Tuesday, they received 63,000 claim forms. If after the process of going through those claim forms all of those were to be valid claims, then there would be approximately $350,000 worth of claims distributed.

Now, obviously, this number is going to go up because as you noted, the final date for submitting a claim is August 22nd, but the number also might go down if, as I said before, the claim administrator goes through those claims and finds that some were inappropriate or should not be members of the class. So we don't really know where we're going to land but the numbers have been going up.

THE COURT: Okay. That's to be expected. That's good. Obviously, your efforts to publicize it have been effective as well as the notice.

Okay. Anything else that I should note?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger, did you want to add anything?

MR. WEINBERGER: No, nothing to add, Your Honor. Thank you.

THE COURT: Okay. So let me mention as well since I had raised this issue as well that the two recent decisions, Kurtz and Berni, in which the Circuit has ruled that a 12(b) -- I'm sorry -- 23(b)(2) class of customers who were prior purchasers could not seek or be awarded injunctive relief even in a settlement context which was true in the Berni case, so I had *sua sponte* raised the question to the parties what effect, if any, that would have on the settlement and the plaintiffs responded that it shouldn't have any effect or impact because this case is distinguishable and has been certified previously by Judge Weinstein as a 23(b)(3) class as well as a 23(b)(2) class, but the parties have stipulated to the dismissal of the appeal with respect to the 23(b)(2) class and I am prepared to rule favorably on that issue as well but I did want to mention that I resolved that and neither side need to address that any further.

So I will now turn to my ruling and this is obviously based on everything I have before me in this case including the written submissions, the supplementation just now by Mr. Pruitt. So bear with me. I am going to read into

the record the ruling.

So to start off, the legal standard that applies here is well known. Approval of a class action settlement in this Circuit has the following legal standard.

Under Rule 23(e) of the Federal Rules of Civil Procedure, a settlement of a class action requires approval of the court. The court may approve the settlement that is binding on the class only if it determines that the settlement is fair, adequate and reasonable and not a product of collusion. This evaluation requires the court to consider both the settlement's term and the negotiating process leading to settlement. Presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiation between experienced capable counsel after meaningful discovery.

That is a quote from Wright versus Stern, 553 FedSupp.2d 337, at 343 to 44, a Southern District of New York decision from 2008.

In order to determine whether the class action settlement is fair, reasonable and adequate, courts in this Circuit traditionally have considered the following factors commonly referred to as the Grinnell factors: First, the complexity, expense and likely duration of the litigation; second, the reaction of the class to the settlement; third, the stage of the proceedings and the amount of discovery

completed; fourth, the risks of establishing liability; fifth, the risks of establishing damages; sixth, the risk of maintaining a class action through trial; seventh, the ability of defendants to withstand greater judgment; eighth, the range of reasonableness of a settlement fund in light of the best possible recovery; and, ninth, the range of reasonableness of the settlement fund in light of the attendant risks of litigation.

And that is, again, a quote from Wright versus Stern, at page 343 which, in turn, cites among other cases City of Detroit versus Grinnell Corp., 494 F.2d 448, at 463, the Second Circuit's decision from 1974 which obviously established the "Grinnell" factors.

I will further note that the Grinnell factors substantially overlap with the Rule 23(e)(2) factors, but includes three factors not addressed by Rule 23(e)(2). A case that explains that is In Re Payment Card Interchange Fee and Merchandise Discovery Antitrust Litigation, 330 F.R.D. 11, at 29, footnote 22, which is an Eastern District decision from 2019.

The weight to be given any particular factor will vary based on the facts and circumstances of the case and that, again, is a proposition cited in Wright versus Stern.

Now, applying the Grinnell factors and Rule 23(e)(2) to this case, I find as follows.

The information presented at today's hearing, the parties' filings and my knowledge in this case lead me to the conclusion that the settlement is fair, reasonable and adequate. While I cannot yet ascertain the settlement class size due to the fact that, as has been discussed, the claim forms are still being submitted and can be submitted up until August 22, 2020, thus far, based on the representation of Mr. Pruitt which is, in turn, based on information from the settlement administrator, 63,000 claim forms have been submitted as of July 20, 2020 which is, I believe, a Tuesday.

The deadline to file exclusions and objections was June 25, 2020, and no class members have objected. In addition, only nine class members have excluded themselves from the settlement. This indicates that the vast majority of class members approve of the settlement agreement.

In addition, I will note that the settlement as per Mr. Pruitt's statements a moment ago could lead to the payment of claims for monetary awards totaling $350,000. The information of Mr. Shaffer which is docketed at 359-3 and is contained in paragraphs 13 through 16, and obviously that information had just been supplemented by Mr. Pruitt based on additional information from Mr. Shaffer.

The parties have litigated this action since 2014 and have appeared more than 30 times before Judge Weinstein and the Magistrate Judges who presided over this matter for

oral argument, evidentiary hearings, settlement conferences and status conferences. The defendant filed a motion to dismiss, docketed as number 17, a motion to deny class certification, docket 59, a renewed motion to dismiss or, alternatively, motion for summary judgment, docket 222, and two motions to decertify the class, dockets 222 and 294. The parties have engaged in extensive discovery prior to discussing settlement.

The settlement discussions were the product of extensive arm's length negotiation between experienced class action attorneys. Settlement discussions first began in 2015 under the supervision of Judge Robert M. Levy and that is noted in the August 12, 2015 minute entry in this case and those discussions were recently renewed with mediation before Judge Steven M. Gold and that was noted in the November 25, 2019 minute entry.

The settlement provides for a monetary benefit of actual damages that is higher than the maximum afforded to the settlement class members in Pettit versus Procter & Gamble, docketed at 15-CV-2150 in the Northern District of California and in that case, a settlement was approved on March 29, 2019.

In addition, per a regression analysis by plaintiff's expert, a grander recovery than might be expected at trial is being achieved via the settlement and that's based on the supplemental declaration of Colin Weir which is docket

329 and I'm referring to paragraph 78.

The availability of statutory damages which were heavily litigated in this case and remained uncertain would at most allow a maximum recovery of $50 per class member in which case the maximum recovery of $50.20 for settlement class members with proofs of purchase exceed their potential maximum statutory recovery.

Procter & Gamble's agreed upon changed labeling practices which extended the injunctive relief granted as part of the Pettit settlement, I believe, for an additional two years are likely to benefit settlement class members and certainly will benefit the public in general.

Now, with regard to attorneys' fees, costs and expenses, regardless of the method used to calculate reasonable attorneys' fees, the Goldberger factors ultimately determine the reasonableness of an attorneys' fee award in a class action settlement. That's a proposition I'm quoting from in Simerlein versus Toyota Motor Corp., number 17-CV-1091, reported at 2019 Westlaw 2417404, and that was a quote at page 24 of the decision which is a District of Connecticut decision dated June 10, 2019.

The Simerlein case, in turn, cites Walmart Stores Inc. versus Visa USA, Inc., 396 F.3d 96, at 121, a Second Circuit decision from 2005.

Now, these factors are, and I quote: First, the

time and labor expended by counsel; second, the magnitude and complexities of the litigation; third, the risk of the litigation; fourth, the quality of the representation; fifth, the requested fee in relation to the settlement; and, sixth, public policy considerations.

That is from Goldberger versus Integrated Resources Inc., 209 F.3d 43, at page 50, a Second Circuit decision from 2000.

In a case where the attorneys' fees are to be paid directly by defendant and, thus, money paid to the attorneys is entirely independent of money awarded to the class, the court's fiduciary rule in overseeing the award is greatly reduced because there is no conflict of interest between attorneys and class members.

And that is a quote from Pearlman versus Cablevision Systems Corp., 2019 Westlaw 3974358, at page 3, an Eastern District of New York decision dated August 20, 2019.

Here, I find that the requested attorneys' fee is reasonable under the lodestar method and per the Goldberger factors because class counsel requests roughly 44 percent less than the market value of their time because the case was of significant magnitude and complexity and because the procedural history of the case shows the high amount of litigation risk associated with the case as well as a significant expenditure of fees and resources litigating this

case to the point of settlement.

The Court also grants an award of the plaintiffs' requested litigation expenses of $202,838.27 which represents the litigation expenses and costs and that's per the Mip declaration, docket 358-3, at pages, sorry, at paragraphs 32 to 34, and those expenses are ones regularly granted by courts in evaluating similar settlement classes as here and that is a citation to or based on a citation to Pearlman, 2019 Westlaw 3974358, at page 7.

Regarding the class representative payment that's requested, I'll say the following. Courts in this Circuit regularly approve service awards ranging from as low as $1,000 to as high as $25,000 in consumer class action settlements, generally, however, awards between $1,000 and $10,000 are more typical.

That's essentially a quote from McLaughlin versus IDT Energy, number 14-CV-4107, a case before Judge Vitaliano, reported at 2018 Westlaw 364627, at page 6. That was a decision issued on July 30, 2018 in which Judge Vitaliano collects cases on that proposition.

The Court agrees that the $10,000 award to Mr. Belfiore, the representative plaintiff in this case, is within the typical range of class representative awards in that it serves to compensate him for the time and effort he expended in assisting the prosecution of this litigation as

well as the risks incurred by coming and continuing as a litigant as well as any other burden sustained by him.

I base that finding on the McLaughlin decision as well. In that part of the decision, McLaughlin quotes Beckman versus T Bank, NA, a decision of the Southern District from 2013 reported at 293 F.R.D. 467, at 483.

Lastly, I will set forth my ruling regarding the injunctive relief issue that I mentioned a moment ago and that I *sua sponte* raised with the parties shortly before this hearing.

On July 8, 2020, the Second Circuit held in Berni versus Varilla, SpA, reported at 2020 Westlaw 3815523, that an equitable exception to Rule 23(b)(2) simply does not exist and courts cannot create one to achieve a policy objective no matter how commendable that objective. That is because, as many other district courts in this Circuit have already noted, courts cannot permit injunctive relief through class settlement when plaintiff would otherwise lack standing to seek such relief under Article III of the constitution.

Where there's no likelihood of future harm, there is no standing to seek an injunction and so no possibility of being certified as a Rule 23(b)(2) class. As such, the district courts in many cases involving past purchasers of such very products as skin cream, vodka, and satellite radio subscriptions have come to the conclusion that past purchasers

cannot be certified as a class under Rule 23(b)(2).

As the parties are aware, the facts in Berni were different than here because there, only a 23(b)(2) class was certified even though the class was made up of or at least could have been made up of past purchasers of the product which was pasta in that case. So there, there was an objector to the settlement who raised this issue and the Circuit made clear that the settlement could not be approved because the class was defective from the outset as a 23(b)(2) only class made up of potential past purchasers who could not benefit from the injunctive relief and thus lack standing. That is from page 6 of the decision that I just read.

Certainly, one interpretation of this holding could be that even plaintiffs in a class certified under both 23(b)(3) and 23(b)(2) would lack standing to obtain the injunctive relief portion of a settlement which is why I had asked the parties to address the potential impact of the Berni decision.

In supplemental briefing ordered by me, plaintiff explained that the holding at Berni does not apply to the settlement class largely because the settlement in Berni was certified, as I mentioned a moment ago, only under 23(b)(2) and would not have been afforded any monetary damages.

Here, in contrast, the settlement class members are properly certified under 23(b)(3) and were certified by

Judge Weinstein earlier in the case. The plaintiff also notes that the settlement class here does not include sub classes or separate definitions based on the Rule 23(b)(2)/Rule 23(b)(3) distinction and that courts, and I quote, "regularly approve settlements that are solely certified pursuant to Rule 23(b)(3) but also include injunctive relief." I'm quoting from the plaintiffs' letter docketed as 360.

The plaintiffs' argument, I believe, does adequately explain why this case is different and why approval of the settlement is not barred by the ruling in Berni of the Second Circuit.

The plaintiffs' letter also summarizes the Second Circuit decision in Kurtz as, and I quote from the letter, "sustaining Judge Weinstein's prior decision certifying the class pursuant to 23(b)(3) in the joint opinions" without discussing that the same decision decertified Kurtz's ruling -- I'm sorry -- Kurtz's Rule 23(b)(2) class, and this is from page 2 of the plaintiffs' letter.

While it seems as though the settlement class in this case is distinguishable because it did not have separate definitions based on the (b)(2)/(b)(3) distinction, as do the non-settlement classes in Kurtz, it is, to me, Kurtz does not necessarily address the situation that we have here.

So because there are no separate class definitions of (b)(2) versus (b)(3) and in sub classes along those lines,

for purposes of settlement in this case, I find that to the extent the settlement provides for injunctive relief in addition to monetary damages, it does not run afoul of the Circuit's recent holding in Kurtz or in Berni.

By order dated October 25, 2019, Judge Weinstein properly certified a class for monetary damages under Rule 23(b)(3) and the settlement class before me is nearly identical to that class for all relevant purposes. Here, the settlement also provides for injunctive relief, mainly that the defendant will continue to implement certain changed practices in its product packaging which had previously been agreed to in the Pettit litigation. A settlement class may be certified solely under 23(b)(3) even if it provides for both monetary and injunctive relief.

As I have previously noted in a case before me, Calibuso versus Bank of America Corp., where injunctive relief is sought in addition to substantial monetary damages, the court may proceed in at least one of three ways: First, certifying the class under Federal Rule of Civil Procedure or FRCP 23(b)(3) for all proceedings; second, certifying separate FRCP 23(b)(2) and (b)(3) classes addressing equitable relief and damages respectively or, third, certifying the class under 23(b)(2) for both equitable and monetary relief but providing all class members with notice and opportunity to opt out.

That's a quote from Calibuso, 299 F.R.D.359 and 367,

and that's from 2014. In that decision, I was quoting Sykes versus Mel Harris and Associates, LLC, 285 Federal Reporter Decision 279 and 288 to 89, which is a Southern District decision from 2012 by Judge Denny Chin.

In Calibuso, I further noted that, and I quote, "Nothing required the court to separately certify settlement class and sub classes to preserve settlement class members' right to object to the programmatic relief, which is the injunctive relief, while still permitting that opt-out of the monetary relief." And that's a quote from pages 367 to 68 of Calibuso. That is, if Rule 23(b)(3) preserves notice and opt-out rights, separate certification of a 23(b)(2) class is not necessary and that's what I ruled in Calibuso.

The Second Circuit has previously noted consistent with this finding, I think, that members of a settlement class certified under 23(b)(3), because they're guaranteed mandatory notice, an opt-out right obviates the need for the court to continue to, and I quote from that decision, "delve into the thorny question" of whether 23(b)(2) certification would also apply where 23(b)(3) certification is appropriate.

That was the Circuit's discussion in In Re Visa Check/MasterMoney Antitrust Litigation versus Visa, and that's reported at 280 F.3d 124, and that's a quote from 146 to 147. The Second Circuit ruled or issued that ruling in 2001. Notably in that case, the Circuit found that the district

court appropriately certified the class under Rule 23(b)(3) where the class had requested both injunctive relief and monetary damages.

So in light of all this precedent and even my own prior ruling related to this issue and based on what I have read and heard from the parties today related to this case, especially the fact that the class members have been given full notice and opportunity to opt out with respect to any aspects of the settlement or based on any aspects of the settlement including the injunctive relief, I find it is permissible to certify the 23(b)(3) settlement class in which class members are being afforded both monetary and injunctive relief.

So that is my ruling and what we will do now is I am going to ask, this is the last part of what I wanted to accomplish today which is to instruct the parties to fill in all the blanks that can be filled in on the current proposed final approval order and submit that to our chambers or via our chambers e-mail in Word form so that it can be reviewed and finalized. So there are a number of blanks that have yet to be filled in but the parties have the information to do so and then that will be issued.

Then, I guess, the last question I have is about the mechanics then in terms of payment. What will happen after August 22nd, I think, which is the date on which the last

claim form can be submitted?

MR. INSLEY-PRUITT: Your Honor, this is Matt Insley-Pruitt from Wolf Popper.

So the claim administrator will review all the claims that have been submitted. As I said before, they need to go through those claims and make sure that there are no obviously incorrect forms and remove any of those that do not represent class members and also do the process we call householding which I represent that only $36.30 total returned for claim members for persons who do not have proof of purchase and 50.20 for those who do have proof of purchase. So it's just a process of making sure that everything is right and we will be able to submit the correct costs.

THE COURT: Okay. Good.

Is there anything that I failed to address from the perspective of the plaintiff in my ruling just now, Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. And Mr. Weinberger?

MR. WEINBERGER: Nothing, Your Honor.

THE COURT: Okay. Is there anything else we need to address at this time? Mr. Pruitt?

MR. INSLEY-PRUITT: No, Your Honor.

THE COURT: Okay. Mr. Weinberger?

MR. WEINBERGER: No. No, Your Honor.

THE COURT: Okay. Well, that concludes this hearing and I appreciate all the hard work and diligence that went into this matter. Perhaps timing is everything. I think this case has managed to get to the finish line whereas the other case has obviously reached a certain stumbling block, but I congratulate you on the settlement which seems to be to achieve at least some measure of compensation as well as programmatic change or some injunctive relief.

All right. So everyone, stay well. Thank you very much.

MR. WEINBERGER: Thank you, Your Honor.

MR. INSLEY-PRUITT: Thank you, Your Honor.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Charleane M. Heading — July 30, 2020

CHARLEANE M. HEADING — DATE